



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1771

FRED WEIBEL,

Petitioner,

vs.

EMORY T. CLARK d/b/a THE
CLARK BUILDING and THE
WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

Respondents.

**BRIEF OF WISCONSIN DEPARTMENT
OF INDUSTRY, LABOR AND
HUMAN RELATIONS IN OPPOSITION
TO PETITION FOR
WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE CASE	2
ARGUMENT	4

**Weibel's Petition For A Writ Of
Certiorari Should Be Denied
Because He Was Not Deprived
Of Due Process And He Was
Not Prejudiced By The
Department's Failure To
Notify Him Of The Specific Act
Of Misconduct Upon Which The
Employer Relied In Opposing
Unemployment Compensation.**

CONCLUSION	7
------------------	---

TABLE OF CASES

Folding Furniture Works v. Wisconsin L.R. Board, 232 Wis. 170, 285 N.W. 851, 286 N.W. 875 (1939)	6
State ex rel. Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N.W. 504 (1939)	5
Weibel v. Clark, 87 Wis. 2d 696, 275 N.W. 686 (1979).....	3,5,6,7

WISCONSIN STATUTES INVOLVED

Sec. 102.23 (2)	6
108.09 (7)	6
227.20 (1)	5

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STATEMENT OF THE CASE

Petitioner Fred Weibel was discharged by respondent, The Clark Building (the "employer"), on March 20, 1975. He filed a claim for unemployment compensation with respondent Wisconsin Department of Industry, Labor and Human Relations. In connection with his claim, Weibel gave a written statement to the Department. He stated that on the day of his discharge, he was informed by the employer's manager that he had been seen stealing candy from a restaurant in the building.

The Department's deputy issued an initial determination on June 4, 1975, which denied unemployment compensation because "[t]he record supports the allegation that the claimant was discharged for misconduct connected with his employment." Weibel appealed from the deputy's initial determination. A subsequent notice of hearing stated that the issue to be heard before the appellate tribunal would be "[m]isconduct."

At the commencement of the hearing, Weibel's attorney objected that he was not adequately prepared to proceed because the notice of hearing did not apprise him of the specific act of misconduct upon which the employer relied in opposing unemployment compensation. It was agreed, however, that the employer would put in its case and that Weibel then would move for an adjournment.

After the employer presented its case, Weibel's attorney moved for an adjournment on the ground of inadequate notice. The hearing examiner denied the motion because "[t]here ha[d] been testimony that Mr. Weibel was aware that he was discharged for stealing candy eggs."

The examiner issued findings of fact and an order denying compensation which were affirmed by the Department. Weibel commenced proceedings for judicial review. He alleged in his complaint that although he demanded information concerning the basis of the employer's allegation of misconduct, he was refused such information both by the Department deputy and by the hearing examiner.

The law partner of Weibel's attorney filed an affidavit with the reviewing court in which it was alleged for the first time that Weibel's attorney had been denied access to the Department's file by the examiner a few days prior to the administrative hearing. An affidavit of the hearing examiner was filed in response wherein the examiner denied recollection of any such request to see the Department's file. Weibel made no request that the reviewing court take evidence on the issue of whether access to the Department's file had been denied.

The circuit court for Dane County, the Honorable George R. Currie, entered an opinion and judgment affirming the Department's denial of unemployment compensation to Weibel. The circuit court's judgment in turn was affirmed on appeal by the Wisconsin Supreme Court. *Weibel v. Clark*, 87 Wis. 2d 696, 275 N.W. 2d 686 (1979).

Weibel has petitioned for a writ of certiorari to review the decision of the Wisconsin Supreme Court. This brief is submitted in opposition to the petition, pursuant to U.S. Sup. Ct. Rule 24, 28 U.S. C. 51.

A R G U M E N T

Weibel's Petition For A Writ Of Certiorari Should Be Denied Because He Was Not Deprived Of Due Process And He Was Not Prejudiced By The Department's Failure To Notify Him Of The Specific Act Of Misconduct Upon Which The Employer Relied In Opposing Unemployment Compensation.

Weibel's primary argument is that he was denied due process because he did not receive adequate notice before hearing of the specific act of misconduct upon which the employer relied in opposing unemployment compensation. For reasons which follow, the Department believes that the Wisconsin courts correctly concluded that Weibel was not deprived of due process and that he was not prejudiced by the Department's failure to provide more specific notice.

Preliminarily, however, the Department objects to several statements in Weibel's petition which are not supported by the record. At page 2 of the petition, Weibel states:

Demands for the specific nature of the ...
"misconduct" alleged were made by petitioner
and his counsel. However, no particulars were
furnished by either the respondent employer or
the Department.

There is no evidence in the record to substantiate that either Weibel or his counsel ever made such demands prior to the commencement of the administrative hearing.

Weibel states at page 6 of his petition that he was "refused entry into [the Department's] file." There is

nothing in the record to support such statement. An affidavit to that effect was filed by the law partner of Weibel's counsel for the first time in the circuit court review proceeding. It is flatly contradicted by a counter-affidavit of the Department's hearing examiner. Moreover, Weibel made no request that the reviewing court take evidence on the issue as provided by law. *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 156, 285 N.W. 504 (1939); cf. sec. 227.20 (1), Wis. Stats.

Finally, at page 7 of his petition, Weibel states that "[i]t is undisputed that until the morning of the hearing neither [Weibel] nor his counsel, in the face of demands therefore, were furnished any notice of the specifics or particulars of the 'misconduct' charge." Again, there is no evidence in the record to support this statement.

Turning to the merits of Weibel's argument, it is undisputed that both the Department's initial determination and its notice of hearing merely state the issue to be "misconduct" and do not specify the act of misconduct upon which the employer relied in opposing unemployment compensation. The Wisconsin courts concluded that "[i]f this were the entire record with respect to apprising [Weibel] of the charges against him which were claimed to be misconduct, the Court would without hesitation determine there was a denial of due process. But this is not the entire record." *Weibel v. Clark*, 87 Wis. 2d at 703-704. The courts went on to conclude, based upon his own written statement and upon testimony given at the hearing, that Weibel *knew* that he had been fired for stealing candy. Moreover, the courts correctly concluded that Weibel was not prejudiced by the Department's failure to provide more specific notice.

A necessary predicate to setting aside an administrative agency order based upon the denial of due process is a determination that the aggrieved person has been prejudiced by the denial. *Folding Furniture Works v. Wisconsin L.R. Board*, 232 Wis. 170, 191, 285 N.W. 851, 286 N.W. 875 (1939); cf. secs. 102.23 (2) and 108.09 (7), Wis. Stats. ["the court shall disregard any irregularity or error of the department unless it be made to affirmatively appear that the plaintiff was damaged thereby"].

Weibel was not prejudiced or "hindered" by the lack of more specific notice of the nature of his misconduct. He *knew* that he was discharged for stealing candy. He offered testimony of employee Hodges in an effort to prove that taking food from the restaurant was condoned because it sometimes was offered to Hodges in exchange for services. Significantly, as the Wisconsin Supreme Court observed, *Weibel v. Clark*, 87 Wis. 2d at 706:

At the commission and circuit court levels [Weibel] had the advantage of having heard the employer's entire case yet he failed to point to a single piece of material evidence he was prevented from producing as a result of the insufficient notice.

CONCLUSION

Weibel was not deprived of due process by the Department's failure to provide more specific notice of the misconduct upon which the employer relied in opposing unemployment compensation. Weibel *knew* that he had been fired for stealing candy from the restaurant in the employer's building. This is evident from his *own* statement to the Department's deputy, from the testimony of restaurant employees Hanson and Levi that Weibel told them he had been discharged for stealing candy, and from Weibel's effort to prove through employee Hodges that taking food from the restaurant was condoned because it sometimes was offered to Hodges in exchange for services.

Weibel was not prejudiced by the Department's failure to provide more specific notice. He "could not be prejudiced by the department's failure to apprise him of something he already knew." *Weibel v. Clark*, 87 Wis. 2d at 705.

It is respectfully submitted that Weibel's petition for a writ of certiorari should be denied.

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